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COURT OF CRIMINAL APPEALS
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FILED
COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

ORLANDO ORTIZ,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

APPELLANT'S BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM THE FOURTH COURT OF APPEALS, NO. 04-18-00430-CR

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IDENTITY OF PARTIES AND COUNSEL

In accordance with Rule of Appellate Procedure 38.2(a)(1)(A), Appellant adopts by reference the Identify of Parties and Counsel in the State's the Brief (identified the State's Brief as "Names of All Parties to the Trial Court's Judgment").

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STATEMENT OF CASE

Nature of Case:	Appellant was charged with and acquitted by a jury of two counts of sexual assault, but convicted of one count of third-degree felony assault involving family violence, by occlusion (C.R. at 1-2, 194-195, 205, 208). Tex. Pen. Code § 22.01(b)(2)(B). Based on two prior felony convictions – one in 1992 and the other in 2003 – Appellant was sentenced as a habitual offender to 40 years in prison (*id.* at 194; V R.R.at 129:03-130:08). The Fourth Court of Appeals reversed, based on the trial court's refusal to allow Appellant a lesser-included assault instruction, and based on a finding that the error was harmful. *Ortiz v. State*, No. 04-18-00430-CR (Sept. 11, 2019). The State, through the State Prosecuting Attorney's Office, petitioned for and was granted this discretionary review.
Trial Court:	*State v. Ortiz*, Cause No. 17-06-00056-CRL 81st / 218th Judicial District Court, Wilson County, Texas Honorable Donna S. Rayes, Presiding
Trial Court Disposition:	Conviction of Third Degree Felony Assault, Family Violence, by Occlusion – Habitual; sentence of 40 years, TDCJ, Institutional Division.
Appellate Court:	Fourth Court of Appeals, No. 04-18-00430-CR Opinion by Justice Irene Rios; Justice Patricia O. Alvarez, Justice Irene Rios, Justice Beth Watkins, Sitting.
Appellate Court Disposition:	Reversed and remanded for new trial.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument.

I.
ISSUES PRESENTED

As urged by the State, the single issue presented is:

> **When a defendant is charged with "assault by occlusion" pursuant to TEX. PENAL CODE § 22.01(b)(2)(B), does the denial of occlusion and admission to causing different injuries entitle him to an instruction on simple assault?**

(State's Brief at 2).

Appellant additionally submits the following threshold issue:

> **Is the State barred by *Degrate, Rochelle, Tallant* or principles of judicial estoppel from seeking review of a ground the State failed to brief and in fact conceded at the Court of Appeals below?**

II.
STATEMENT OF FACTS

Appellant does not dispute the accuracy of quotations from the record in the State's Brief. For the sake of completeness, however, Appellant supplements the State's factual recitation with this Statement of Facts. Tex. R. App. P. 38.2(a)(1)(B), 71.3. Appellant further incorporates by reference into this section the Statement of Facts of contained in his Brief filed with the court of appeals below.

Appellant Orlando Ortiz (hereinafter "Ortiz") was charged with two counts of sexual assault, and one count of third-degree felony assault involving family violence, *by occlusion* (C.R. at 1-2, 194-195, 205, 208). The jury **acquitted** Ortiz of the sexual assault charges, but convicted him of the family violence assault by occlusion (C.R. at 1-2, 194-195, 205, 208). Ortiz was ultimately sentenced by the Court to ***40 years in prison***, based on the enhancement provisions available only through the occlusion charge (*id.* at 194; V R.R.at 129:03-130:08).

At his jury trial, the State called 12 witnesses (II R.R. at 154, 162, 166; III R.R. at 3, 21, 35, 46, 59, 66, 88, 235, IV R.R. at 4). Only *one* of those witnesses actually saw what allegedly happened: the complainant, Ortiz's ex-girlfriend (III R.R. at 88-235). Ortiz was the only other witness to the alleged crimes.

The evidence at trial pointed to a struggle, but conflicted as to how that struggle occurred. The complainant testified that Ortiz raped her and assaulted her by choking her (*id.* at 92:04-92:12, 116:15-121:05).

Ortiz took the stand and testified to a very different version of events (*see generally* IV R.R. at 67-145). Ortiz described the complainant as very jealous (*id.* at 73:01-73:25). According to Ortiz, she attacked him on the date in question in a jealous rage, and he attempted to ward off her aggressiveness by restraining her arms and holding her down on the bed (*id.* at 78:09-84:24). Ortiz admitted that he touched her neck with both hands, but was adamant that he "did not squeeze" and did not try to strangle her. (*id.* at 81:14-82:25). Ortiz testified that his hands made contact with the complainant's neck for only a few seconds, in the form of a stiff-arm, in an effort to restrain her from attacking him (*id.* at 81:15-81:19, 82:19-82:20):

Q: What was her demeanor at this time?

A: She was still angry.

Q: And what happened after that?

A: I let her go and she continued swinging and I got on her and I – that's when I – that's when I started restraining her.

Q: How did you restrain her?

A: At first, I tried to push her down. And she kept trying to swing and kick and just fighting back. And I grabbed her with both hands on her neck. But I did not squeeze or try to choke her out. I just tried to tell her to stop. My Exact words were, "Cut the bull**."**

***

Q: Why did you grab her by the neck?

A: To keep her from hitting me.

***

Q: How long did you restrain her from the neck?

A: A couple seconds.

(IV R.R. at 81:08-81:19, 82:19-82:20).

After Ortiz testified, the defense also offered a character witness who testified that the alleged victim had a reputation in the community for being untruthful (*id.* at 148:24-149:04).

In addition to Ortiz's direct testimony controverting the occlusion element, the photographs offered by the State reflect bruises on one side of the complainant's neck, but not the other, and no bruises along the path of her throat (*id.* at 53:18-53:20 ("Q: As a matter of fact, we see no bruising in the throat area whatsoever. A. No, not in frontside, no.")). The bruising path depicted in these photographs suggested that Ortiz in fact did not choke the complainant.

In addition to Ortiz's direct evidence and other evidence calling into question the occlusion element, the complainant's credibility was front-and-center at trial. The complainant described how she overcame Ortiz's attempt to stab her – while Ortiz had her pinned underneath him on the bed – **by grabbing the knife blade with her bare hands** (III R.R. at 92:04-92:12, 116:06-116:19, 117:02-117:08, 118:02-118:04, 120:09-121:05).

Notably, not a single photograph admitted or offered by the State depicted any cut-marks or bandages on the complainant's hands:

(VI R.R. at Ex. 7, 31 (taken night in question)).

The SANE report did not describe any injuries to her hands (VI R.R. at p. 20).

Most evidently, a photograph taken just three days after the incident of her open hands did not show any cutmarks:

(VI R.R. at Ex. 56).

Additionally, the complainant also described how she, *weighing less than 100 pounds*, threw Ortiz's large-frame body off of her numerous times, and ultimately escaped (*see generally* III R.R. at 84:11-84:23, 152:17-153:17; *see also id.* at 180:13-181:03 ("Q: Right? Okay. Now, I have to ask you, I'm having a hard time understanding how you could be lying on the bed and . . . you're able to move your arms to force him off . . .. Could explain that to me, please? **A:No, I can't. But I did**.").

Based on all of the evidence admitted at trial, including the direct evidence offered by Ortiz, Ortiz timely and adequately requested the lesser-included offense of assault, which the trial court affirmatively denied on the record (IV R.R. 156:23-157:20).

The court of appeals reversed and awarded Ortiz a new trial, based on the trial court's refusal to grant the lesser-included instruction.

III.
SUMMARY OF ARGUMENT

This Court must either dismiss the State's petition as improvidently granted, or affirm the opinion and judgment of the court of appeals, because:

1. **The State's argument is jurisdictionally barred because it was not considered by the Court of Appeals *or even briefed below*.** Tex. R. App. P. 66.3; *State v. Consaul*, 982 S.W.2d 899 (Tex. Crim. App. 1998); *Sotelo v. State*, 913 S.W.2d 507 (Tex. Crim. App. 1996) (en banc); *accord Degrate*, 712 S.W.2d 755, 756-757 (Tex. Crim. App. 1986).

2. **The State's argument is procedurally barred or barred by judicial estoppel because the State expressly and affirmatively conceded this issue below.** *Rochelle v. State*, 791 S.W.2d 121 (Tex. Crim. App. 1990); *Tallant v. State*, 742 S.W.2d 292, 294 (Tex. Crim. App. 1987); *Davidson v. State*, 737 S.W.2d 942, 948 (Tex. App.-Amarillo 1987, pet. ref'd).

3. **The State's argument – that assault is not a lesser-included offense of assault by occlusion – is at odds with the statutory text and has been rejected by every Court of Appeals which has considered this issue.** *See, e.g.*, *Harrison v. State*, No. 06-11-00196-CR at *6 (Tex. App.—Texarkana May 18, 2012, pet. ref'd) (mem. op.) ("The first step of the Hall analysis has been met—assault is a lesser included offense of assault (family violence) by occlusion.").

IV.
ARGUMENT

A. Under *Degrate*, *Rochelle*, and *Tallant*, the State is Precluded from Seeking Review on a Ground the State Failed to Brief and In Fact Conceded at the Court of Appeals Below; Accordingly, this Court Must Dismiss the State's Petition as Improvidently Granted

The State's central argument ***to this Court*** is that a "simple assault" – meaning an assault defined in Penal Code § 22.01(a)(1) – is *not* a lesser-included offense of assault family violence by occlusion – an assault defined in Penal Code § 22.01(b)(2)(B) (State's Brief p. 7). Essentially, the State argues the trial court correctly denied Ortiz's request for a lesser-included instruction because there was no lesser-included offense to the charged offense.

But the State *affirmatively and unequivocally* took the *opposite* position at the Fourth Court of Appeals. In its brief filed below, the State writes:

> **The State concedes that assault is a lesser included offense of assault by occlusion, so the issue is whether there was any evidence to directly support that the Appellant caused bodily injury but did not choke his victim (State's Brief, No. 04-18-00430-CR p. 10).**

For this reason, the State's Petition for Review must be dismissed as improvidently granted. *State v. Consaul*, 982 S.W.2d 899 (Tex. Crim. App. 1998); *Sotelo v. State*, 913 S.W.2d 507 (Tex. Crim. App. 1996) (en banc); *but see Rhodes v. State*, 240 S.W.3d 882, 887 n.9 (Tex. Crim. App. 2007) (distinguishing *Sotelo*).

First, in *Degrate*, this Court emphasized that a "discussion of principles of law, without reference to the holding of the court of appeals, will usually be insufficient to persuade this Court to exercise its discretionary jurisdiction." 712 S.W.2d 755, 756-757 (Tex. Crim. App. 1986). This jurisdictional tenet is embodied in Rule of Appellate Procedure 66.3 ("Reasons for Granting Review"). *Accord Bradley v. State*, 235 S.W.3d 808, 809-810 (Tex. Crim. App., 2007) (Cochran, J., concurring) ("We will not exercise our discretionary review authority to address the underlying merits of a claim that the court of appeals declined to address because of a failure to preserve that claim, especially when an appellant fails to even discuss the preservation issue in the argument section.")

As explained by Judge Price's concurring opinion in *Cochran*:

> [T]he State made no argument to either the trial court or the Court of Appeals as to the issue of [presented to the Court of Criminal Appeals]. Since the State made no argument regarding the issue . . . the Court of Appeals neither considered nor ruled on that issue.
>
> ***
>
> As we have repeatedly stated, "This court reviews only 'decisions' of the courts of appeals; we do not reach the merits of *any* party's contention when it has not been addressed by the lower appellate court."

State v. Consaul, 982 S.W.2d 899, 901-902 (Tex. Crim. App. 1998) (Price, J., concurring) (quoting *Sotelo v. State*, 913 S.W.2d 507, 509 (Tex. Crim. App. 1996); *see also Gregory v. State*, 176 S.W.3d 826 (Tex. Crim. App. 2005) (Holcomb, J., concurring); *King v. State*, 125 S.W.3d 517 (Tex. Crim. App. 2003) (Cochran, J.,

concurring); *Salinas v. State*, 897 S.W.2d 785 (Tex. Crim. App. 1995) (Baird, J., concurring); *Leal v. State*, 773 S.W.2d 296 (Tex. Crim. App. 1989) (per curiam).

Here, the State's sole argument to this Court was not considered by the Court of Appeals *or even briefed below*. Consequently, this Court does not have jurisdiction to hear this case. Tex. R. App. P. 66.3; *State v. Consaul*, 982 S.W.2d 899 (Tex. Crim. App. 1998); *Sotelo v. State*, 913 S.W.2d 507 (Tex. Crim. App. 1996) (en banc); *accord Degrate*, 712 S.W.2d 755, 756-757 (Tex. Crim. App. 1986).

Second, *Rochelle v. State*, 791 S.W.2d 121 (Tex. Crim. App. 1990) operates to procedurally bar the State's argument. In *Rochelle*, the defendant lost at trial, but won at the court of appeals. *Id.* at 122. The State petitioned this Court based on a new argument, not presented to the court of appeals.[1] *Id.* at 123. This Court concluded that the State was procedurally barred from presenting its new argument because it was "not a 'matter determined by [the] court of appeals' on original submission." *Id.* at 125 ("Since we hold that the State has failed to preserve the alleged error for review, we do not address the merits of its ground for review. The

[1] The State in *Rochelle* first presented its new argument in a motion for rehearing, which it untimely filed at the court of appeals. *Id.* "Before we may reach this issue, however, we must first address appellant's claim, properly raised in appellant's reply to the State's motion for rehearing in the court of appeals and in appellant's reply to the State's petition for discretionary review, that the State has waived its waiver argument by not presenting it to the court of appeals until filing a motion for rehearing."). This Court ultimately concluded that the court of appeals did not and was not required to consider the State's new argument. *Id.* at 124.

State's first ground for review is overruled, and judgment of the court of appeals is affirmed.").

The procedural history and material facts of this case are indistinguishable from *Rochelle*. Ortiz lost at trial, but won on appeal. The State seeks to reinstate Ortiz's now overturned conviction based on a new argument, which the State *did not make* to the court of appeals. The result here must be the same as *Rochelle*. This Court must dismiss the State's Petition as improvidently granted.

Third, the State did not simply fail to address the lesser-included issue at the court of appeals. Rather, the State **expressly conceded** that "assault is a lesser included offense of assault by occlusion . . . (State's Brief, No. 04-18-00430-CR p. 10). The State takes precisely the opposite position now (State's Brief at p. 7). As a result, neither Ortiz nor the court of appeals below had the opportunity to address this issue. In basic terms, the State has flipped its position at the last possible stage of the game.

As such, the doctrine of judicial estoppel provides yet another basis for barring the State's argument here. "[J]udicial estoppel 'arises from positive rules of procedure based on justice and sound public policy.'" *Davidson v. State*, 737 S.W.2d 942, 948 (Tex. App.-Amarillo 1987, pet. ref'd) (quoting *Long v. Knox*, 155 Tex. 581, 291 S.W.2d 292, 295 (1956)). "It effectively estopps a party who has taken a position in an earlier proceeding from taking a contrary position at a later

time." *Id.* "Its essential function is to prevent litigants from taking contradictory positions in successive proceedings." *Hall v. State*, 283 S.W.3d 137, 156 (Tex. App.—Austin 2009, pet. ref'd).; *accord Davidson* ("The record shows that counsel objected to the prosecutor's introduction of evidence and made his statement that there was no question as to the victim's cause of death. Such a statement qualifies as an unretracted judicial admission, and for this reason, appellant is estopped to now maintain that the state did not satisfactorily show the cause of death of the victim.").

Although not expressly referring to the doctrine of judicial estoppel, this Court's opinion in *Tallant v. State*, 742 S.W.2d 292, 294 (Tex. Crim. App. 1987) emphasizes the same point and is controlling (emphasis added):

> **The State may not concede the error, as it did below, and then for the first time submit here that very complaint withheld from the court of appeals, secure in the thought that this Court will determine the court of appeals erred in deciding consequences of the error the State confessed to it in open court.**

Because the State now changes the position it affirmatively took below, "positive rules of procedure based on justice and sound policy" preclude the State from presenting its argument here. *Davidson*, 737 S.W.2d at 948; *accord Tallant*, 742 S.W.2d at 294.

B. The State's "Mutually Exclusive" Argument Is Not Supported by the Framework of Penal Code § 22.01

Even if we were able to reach the merits, based on the intermediate courts who have considered this issue, the State's position is dubious. *See, e.g.*, *Hardeman v. State*, 556 S.W.3d 916, 921 (Tex. App.—Eastland 2018, pet. ref'd) ("[S]imple assault is a lesser included offense because it is included within the proof necessary to establish assault family violence by strangulation."); *Johnson v. State*, No. 04-17-00398-CR (Tex. App.—San Antonio Jul. 5, 2018, pet. ref'd) (mem. op.) "Under the first step of the analysis, the State concedes the requested lesser offense of assault bodily injury is a lesser-included offense of the charged offense."); *Webb v. State*, No. 10-16-00212-CR at *3 (Tex. App.—Waco Oct. 11, 2017, pet. ref'd) (mem. op.) ("The State concedes that class A misdemeanor assault is a lesser-included offense of assault by occlusion."); *Amaro v. State*, No. 08-14-00052-CR at *8-9 (Tex. App.—El Paso June 14, 2016, no pet.) (mem. op.) ("Under the cognate-pleadings test, we therefore conclude that the offense of assault causing bodily injury was a lesser included offense of the offense of assault family violence by strangulation, as alleged in the indictment."); *Harrison v. State*, No. 06-11-00196-CR at *6 (Tex. App.—Texarkana May 18, 2012, pet. ref'd) (mem. op.) ("The first step of the Hall analysis has been met—assault is a lesser included offense of assault (family violence) by occlusion.").

The law on lesser-included offenses is straightforward. Under the "cognate-pleadings" test, the Court examines whether the larger offense contained in the charging instrument contains all of the essential elements of the lesser offense. *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007) ("[T]he elements and the facts alleged in the charging instrument are used to find lesser-included offenses; therefore, the elements of the lesser offense do not have to be pleaded if they can be deduced from the facts alleged in the indictment.").

In most of the cases cited above, the State conceded – as it did below – that "assault is a lesser included offense of assault by occlusion" (State's Brief, No. 04-18-00430-CR).

Instead of conceding the point here, the State is essentially repositioning the argument that was rejected by the Texarkana Court of Appeals in *Harrison*. In that case, the State argued that the "occlusion" element in Penal Code § 22.01(b)(2)(B) was mutually exclusive from "bodily injury" element in § 22.01(a)(1). *Harrison*, No. 06-11-00196-CR at p. 11. In other words, the State argued that it could prove "occlusion" without having to prove "bodily injury." *Id.*

The State's position in *Harrison* was based on statements contained in a legislative committee report. *Id.* Focusing on the plain statutory language – namely, the phrase, **"an offense under Subsection (a)(1)" in the introductory language in subsection (b)** – the Texarkana Court held:

> The Texas Court of Criminal Appeals has instructed that we are bound to give effect to the plain meaning of statutory language as "the best indicator of legislative intent." *Shipp v. State*, 331 S.W.3d 433, 437 (Tex. Crim. App. 2011). The plain language of the statute is clear. Bodily injury is an element of assault (family violence) by occlusion.

Id.

The State is now asking this Court to merge and replace the term "bodily injury" with "occlusion." In other words, the State contends that once the State alleges "occlusion," the indicted offense no longer has a "bodily injury" element. That is why, according to the State, an assault by occlusion under Penal Code § 22.01(b)(2)(B) cannot be a lesser-included offense of an assault under Penal Code § 22.01(a)(1).

This argument echoes the flawed position taken in *Harrison*. The offense in 22.01(b)(2)(B) is essentially derivative of the offense in § 22.01(a)(1). The introductory paragraph of 22.01(b) illustrates this point (emphasis added):

> Sec. 22.01. ASSAULT.
> (a) A person commits an **offense** if the person:
>
> (1) intentionally, knowingly, or recklessly causes **bodily injury** to another, including the person's spouse;
>
> ***
>
> (b) ***An offense under Subsection (a)(1)*** is a Class A misdemeanor, **except that *the offense* is a felony of the third degree if the offense is committed against**:
>
> ***
>
> (2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if:
>
> ***

> (B) the offense is **committed by** intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth;

Tex. Penal Code § 22.01 (2013).

The *Harrison* court found this statutory language "clear," and for good reason. Merging and replacing the term "bodily injury" with "occlusion" would violate the fundamental principle that Legislature intends every work in a statute to have meaning and be given effect. *Shipp v. State*, 331 S.W.3d 433, 437 n. 25 (Tex. Crim. App. 2011). This especially true in light of the Legislature's separate, statutory definition of "bodily injury." Tex. Penal Code § 1.07(a)(8) ("'Bodily injury' means physical pain, illness, or any impairment of physical condition").

The State's reading of the statute is also contrary to this Court's opinion in *Price v. State*, 457 S.W.3d 437 (Tex. Crim. App. 2015), a case chiefly relied on by the State in its brief. In *Price*, this Court observed that an assault under Penal Code § 22.01(b)(2) "cannot be committed *without bodily injury*." *Id.* at 442 (emphasis added).

Furthermore, the *Marshall* case relied on by the State holds that "occlusion" is a *type of* "bodily injury." *Marshall v. State*, 479 S.W.3d 840, 845 (Tex. Crim. App. 2016). *Marshall* does not displace the statutory definition of bodily injury. Consequently, *Marshall* does not support the State's theory that the allegation of "occlusion" eliminates the "bodily injury" element from the offense. Accordingly,

Penal Code § 22.01(a)(1) (a "simple assault") is a lesser-included offense of § 22.01(b)(2)(B) (assault by occlusion). *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007); *see also Hardeman v. State,* 556 S.W.3d 916, 921 (Tex. App.—Eastland 2018, pet. ref'd) ("[S]imple assault is a lesser included offense because it is included within the proof necessary to establish assault family violence by strangulation."); *Johnson v. State*, No. 04-17-00398-CR (Tex. App.—San Antonio Jul. 5, 2018, pet. ref'd) (mem. op.) "Under the first step of the analysis, the State concedes the requested lesser offense of assault bodily injury is a lesser-included offense of the charged offense."); *Webb v. State*, No. 10-16-00212-CR at *3 (Tex. App.—Waco Oct. 11, 2017, pet. ref'd) (mem. op.) ("The State concedes that class A misdemeanor assault is a lesser-included offense of assault by occlusion."); *Amaro v. State*, No. 08-14-00052-CR at *8-9 (Tex. App.—El Paso June 14, 2016, no pet.) (mem. op.) ("Under the cognate-pleadings test, we therefore conclude that the offense of assault causing bodily injury was a lesser included offense of the offense of assault family violence by strangulation, as alleged in the indictment."); *Harrison v. State*, No. 06-11-00196-CR at *6 (Tex. App.—Texarkana May 18, 2012, pet. ref'd) (mem. op.) ("The first step of the Hall analysis has been met—assault is a lesser included offense of assault (family violence) by occlusion.").

V.
PRAYER

For the reasons stated above, Appellant Orlando Ortiz requests the State's Petition for Review be DISMISSED AS IMPROVIDENTLY GRANTED, or, alternatively, that the Fourth Court of Appeals' opinion and judgment be AFFIRMED IN ALL PARTS, and that this case be REMANDED for a NEW TRIAL, and that Appellant be awarded such other relief to which he may be entitled.

Respectfully submitted,

/S/ NOHL BRYANT

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CERTIFICATE OF COMPLIANCE

I certify that this Brief contains **3,790** words, excluding the words exempted by Rule 9.4(i)(1) of the Rules of Appellate Procedure.

/S/ NOHL BRYANT

_____

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CERTIFICATE OF SERVICE

I certify that the foregoing instrument has been served on January 21, 2020 on the persons named below, in the manner described adjacent to their respective names, all in accordance with Rule 9.5 of the Rules of Appellate Procedure.

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